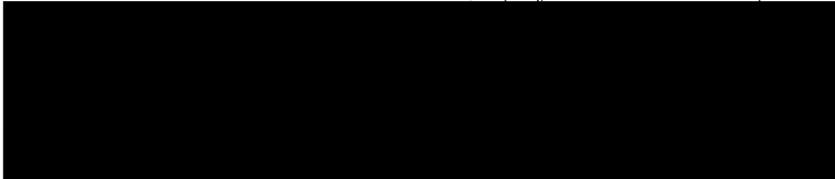


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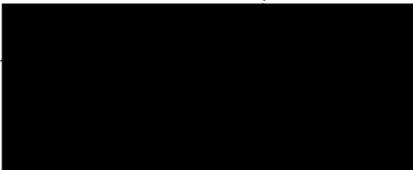
Date: DEC 05 2006

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The acting director of the Vermont Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner provides medical staff. It seeks to employ the beneficiary as an occupational therapist pursuant to section 101(a)(15)(H)(15)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 101(a)(15)(H)(i)(b). The director denied the petition finding that: (1) the petitioner failed to submit evidence substantiating that the beneficiary would perform services as an occupational therapist for the end-client, Plymouth House Health Care Center; (2) the petitioner failed to submit a valid labor condition application (LCA) for the intended place of employment; and (3) the petitioner failed to establish the beneficiary's qualifications to perform the duties of a licensed occupational therapist in the state of Pennsylvania.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B, with the petitioner's letter and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The first issue that the AAO will consider is the director's finding that the petitioner failed to submit evidence substantiating that the beneficiary would perform services as an occupational therapist for the end-client, Plymouth House Health Care Center.¹

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

¹ Counsel's June 1, 2005 letter states that [REDACTED] is a rehabilitation management company that will manage the rehabilitation team at Plymouth House Health Care Center and oversee insurance reimbursement mandates for the facility.

In his denial letter the director stated that the petitioner was requested to submit contracts that the petitioner entered into with the third party facility where the beneficiary will work and contracts between that facility and the beneficiary. According to the director, in response to the request the petitioner submitted a contract with [REDACTED] a staffing agency that furnishes healthcare services to patients, clients, and residents in facilities. The director stated that the submitted Appendix A indicates that the beneficiary will work for the "end client," Plymouth House Health Care Center located at Whitemarsh, Pennsylvania. The director noted that no contract was provided between Staffing Plus, Inc. and Plymouth House Health Care Center in support of the claim.

Based on the evidence in the record, the AAO concurs with the director's conclusion that the record fails to establish that the beneficiary would be employed in a specialty occupation at Plymouth House Health Care Center.

In her June 1, 2005 letter counsel indicates that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another other, similar petition in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the assertions made by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The July 27, 2004 letter from the petitioner indicates that it recruits healthcare professionals for its clients' facilities and provides "foreign-educated therapists and nurses to various facilities" based on contracts with the facilities and "with other staffing companies." The December 21, 2004 letter from counsel, submitted in response to the request for evidence, indicates that the "petitioner is a staffing company with clients that hold contracts in different states." The record contains a copy of the petitioner's "Provider Agreement-Allied Health Professionals" agreement with Staffing Plus Inc. (SP), which indicates that the petitioner will provide qualified healthcare professionals for placement in SP's facilities and that "[n]othing in this [a]greement shall be construed to establish the relationship of principal and agent" with SP. The letter in the record, dated December 23, 2004, from SP states that the beneficiary will work in the capacity of occupational therapist at Plymouth House for Team Rehab, Inc., and that he will remain the petitioner's employee while there. The March 21, 2003 staffing agreement between SP and its client [REDACTED] and the August 16, 2001 agreement between SP and its client, [REDACTED], both state: "SP employs Healthcare/Educational Professional[s] and said Healthcare/Educational Professional[s] will be instructed to work under the supervision of Client. Client acknowledges the right of SP to dismiss [the] Healthcare/Educational Professional"; and "[Client] will provide [the] Healthcare/Educational Professional with adequate orientation, instruction, and state required supervision if any is necessary to enable the Healthcare/Educational Professional to perform [the] Assignment." The AAO notes that the February 27, 2004 letter in the record from the petitioner implies that the petitioner will pay the beneficiary's salary and provide health care benefits.

The December 21, 2004 letter from counsel and the July 27, 2004 letter from the petitioner indicate that the petitioner recruits and places healthcare professionals at its client facilities and provides “foreign-educated therapists and nurses to various facilities” based on contracts with the facilities and “with other staffing companies.” This evidence shows that the petitioner is an employment contractor in that the petitioner will place the beneficiary at multiple work locations to perform services established by contractual agreements for third-party companies.

The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for the purpose of determining whether a proffered position is a specialty occupation, the petitioner acting as an employment contractor is merely a “token employer,” while the entity for which the services are to be performed is the “more relevant employer.” The *Defensor* court recognized that evidence of the client companies’ job requirements is critical where the work is to be performed for entities other than the petitioner. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services.

There is no evidence in the record from an authorized representative of Plymouth House Health Care Center, the entity for whom the beneficiary will provide consulting services, describing the specific duties that the beneficiary would perform for Plymouth House Health Care Center or the duration of his assignment there. As *Defensor* indicates that evidence of the client companies’ job requirements is critical if the work is to be performed for entities other than the petitioner, the petitioner needed to submit evidence that the proposed position qualifies as a specialty occupation on the basis of the job requirements imposed by Plymouth House Health Care Center and the other clients for whom the beneficiary will provide consulting services, and the evidence needed to indicate the duration of the assignment and identify the beneficiary as assigned by the client to provide consulting services as an occupational therapist. Absent this evidence, the petitioner has not established the proposed position as a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As the record does not contain any documentation that establishes the specific duties the beneficiary would perform under contract for the petitioner’s clients, the AAO cannot analyze whether the duties to be performed by the beneficiary would require at least a baccalaureate degree or the equivalent in a specific specialty, as required for classification as a specialty occupation. Accordingly, the petitioner has not established that the proposed position qualifies as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(A) or that the beneficiary would be coming temporarily to the United States to perform the duties of a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(I).

The evidence of record, including the February 27, 2004 offer letter to the beneficiary and the contractual agreements, establish that the petitioner will act as the beneficiary's employer in that it will hire, pay, fire, supervise, or otherwise control the work of the beneficiary.² See 8 C.F.R. § 214.2(h)(4)(ii).

Pursuant to the language at 8 C.F.R. § 214.2(h)(2)(i)(B), employers must submit an itinerary with the dates and locations of employment if the beneficiary's duties will be performed in more than one location.

In his RFE, the director asked for the contract with the specific facility where the beneficiary will work. In the Aytes memorandum cited at footnote 2, the director has the discretion to request that the petitioner who will employ the beneficiary in multiple locations submit an itinerary. Upon review, the director properly exercised his discretion to request the contract with the specific facility or facilities where the beneficiary will work. There is no evidence in the record indicating the duration of the beneficiary's proposed assignment to Plymouth House Health Care Center, the entity for whom the beneficiary will provide consulting services, or any other contract or evidence of record establishing the dates and locations of the beneficiary's proposed work. As the petitioner has not complied with the requirements at 8 C.F.R. § 214.2(h)(2)(i)(B), for this reason the petition must be denied.³

The second issue that the AAO will consider is the director's finding that the petitioner failed to submit a valid LCA for the intended place of employment, which the Form I-129 petition and its accompanying LCA show as Allentown, Pennsylvania.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,
3. Evidence that the alien qualifies to perform services in the specialty occupation.

Appendix-A of the document entitled "Provider Agreement – Allied Health Professionals," entered into between SP and the petitioner, and submitted in response to the RFE, indicates that the beneficiary will work at Plymouth House Health Care Center located at Whitemarsh, Pennsylvania.⁴ The LCA filed with the

² See also Memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, *Interpretation of the Term "Itinerary" Found in 8 C.F.R. 214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification*, HQ 70/6.2.8 (December 29, 1995).

³ As noted by Assistant Commissioner Aytes in the cited 1995 memorandum, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment."

⁴ It is noted that there is no document in the record from an authorized representative of Plymouth House Health Care Center confirming that the beneficiary will provide services for Plymouth House Health Care Center.

petition indicates that the beneficiary will work in Allentown, Pennsylvania. On appeal, counsel submits an LCA for Plymouth Meeting, Pennsylvania.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) provides that the petitioner shall submit with the H-1B petition a certification from the Secretary of Labor that it has filed an LCA. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). A visa petition may not be approved at the future date after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Here, the H-1B petition was filed on August 19, 2004, and the LCA submitted on appeal was filed on May 27, 2005. As the LCA submitted on appeal is subsequent to the filing of the petition, the petitioner failed to establish eligibility at the time of filing the nonimmigrant visa petition on August 19, 2004. Thus, based on the evidence of record, the petitioner has not complied with the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B). For this reason, the petition will be denied.

The last issue that the AAO will address is whether the beneficiary is qualified to perform the duties of an occupational therapist in the state of Pennsylvania.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The director stated that the letter from the Commonwealth of Pennsylvania, Department of State, Bureau of Professional and Occupational Affairs, State Board of Occupational Therapy and Education and Licensure, indicates that the beneficiary needs to submit a social security number to the licensing authority; but that the letter does not state that the beneficiary's application is otherwise approved but for lack of the social security number. The director found the evidence of record did not establish that the beneficiary is licensed to practice as an occupational therapist in Pennsylvania.

On appeal, the petitioner asserts that the beneficiary qualifies for the proffered position, and refers to a May 25, 2005 letter and a December 1, 2004 letter from the Pennsylvania licensing authority to support her assertion.

Upon review of the record, the petitioner has not established that the beneficiary qualifies to perform the proposed position under 8 C.F.R. § 214.2(h)(4)(iii)(C)(3).

The record shows that the instant H-1B petition was filed on August 19, 2004. With respect to the beneficiary's qualifications, it reflects that the National Board for Certification in Occupational Therapy, Inc. certified the beneficiary as an occupational therapist on September 25, 2004. The May 25, 2005 letter from the Pennsylvania licensing authority indicates that once the beneficiary receives a social security number his license will be issued.

A November 20, 2001 memorandum from Thomas E. Cook discussing social securing cards and the adjudication of H-1B petitions for public high school teachers is relevant here. It states:

An H-1B petition filed on behalf of an alien beneficiary who does not have a valid state license shall be approved for a period of 1-year provided that the only obstacle to obtaining state licensure is the fact that the alien cannot obtain a social security card from the SSA. Petitions filed for these aliens must contain evidence from the state licensing board clearly stating that the only obstacle to the issuance of state licensure is the lack of a social security card. In addition, the petitioner must establish that all other regulatory and statutory requirements for the occupation have been met. . . .

The official statement from Pennsylvania's licensing authority indicates that the beneficiary is eligible for temporary or permanent licensure to practice as an occupational therapist, and that once the beneficiary submits a social security number a license will be issued. The approval of the H-1B petition will provide the beneficiary with a nonimmigrant classification that will permit him to obtain a social security number, and the state of Pennsylvania will then issue a temporary or permanent license for him to practice as an occupational therapist there.

Nevertheless, the evidence of record fails to establish that the beneficiary was qualified for the proposed position at the time the H-1B petition was filed on August 19, 2004. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm.

1978). With the case here, the evidence of record reflects that the beneficiary was granted certification as an occupational therapist after the filing of the petition on August 19, 2004. According to the record, the letters from the Pennsylvania licensing authority indicate that the beneficiary was qualified to receive licensure as an occupational therapist on December 1, 2004. Based on these documents, the petitioner fails to establish that the beneficiary was qualified for the occupational therapist position at the time the petition was filed on August 19, 2004.

For reasons previously discussed, the record does not establish that the petitioner demonstrated that the beneficiary would be coming to the United States to perform services in a specialty occupation, as required by the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B); or that the petitioner submitted a valid LCA for the intended place of employment as required at 8 C.F.R. § 214.2(h)(4)(iii)(B); or that the beneficiary was qualified to perform services in a specialty occupation, as required pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C) as of the petition's filing date. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition is denied.